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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RON MILETICH et al., Plaintiffs and Appellants, v. TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY et al., Defendants and Respondents.	D046869 (Super. Ct. No. GIC827701)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed in part, reversed in part.

Ron and Teresa Miletich appeal a judgment entered after the trial court sustained a demurrer without leave to amend as to their complaint for property damage against Steve McKibban, individually and doing business as MC & Associates (McKibban), a roofer who was hired by their insurer, Travelers Property Casualty Insurance Company (Travelers), to conduct an inspection of their home as part of processing a claim they made under their homeowners policy. The Miletichs argue that the court erred in (1)

granting McKibban's prior motion for judgment on the pleadings as to their claims for fraud and concealment, violation of Business and Professions Code section 17200 and negligence because the motion was untimely; (2) sustaining McKibban's demurrers as to those same causes of action; and (3) failing to grant them leave to amend. We agree that the Miletichs have alleged facts supporting a general negligence claim as against McKibban and reverse the judgment in that regard; in all other respects we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In accordance with the principles governing our review of a ruling sustaining a demurrer, the following factual recitation is taken from the allegations of the Miletichs' first amended complaint (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 382, fn. 1).

In November 2002, the Miletichs filed a claim with Travelers for storm damage to their home. After several inspections of the property by Travelers' adjuster, the insurer initially denied coverage for certain items that the Miletichs submitted in their claim, including damage to the roof of the house. After the Miletichs retained counsel and presented photographs of the roof and a damage estimate prepared by their general contractor showing repair costs of $28,416.89 for the roof, a fence and interior damage, Travelers admitted that the roof had sustained damage from the storm; it took the position, however, that the entire roof did not need to be replaced and hired McKibban, who unbeknownst to the Miletichs was not a licensed roofing contractor, to do an inspection of the roof to determine the scope of the damage.

McKibban conducted a visual inspection of the roof, during which time he walked on the roof shingles, causing damage and making the roof susceptible to additional leaking.

Without obtaining information about the history of the roof or conducting more than a superficial investigation of the condition of the roofing substrate, McKibban prepared a report opining that the damage to the roof was the result of erosion and normal wear and tear rather than wind. Travelers thereafter issued the Miletichs a $350 "roofing minimum charge that would have been required in case a few of the shingles were in fact blown by the wind" and closed its file relating to the Miletichs' claims. Because the funds were insufficient to repair the roof damage, the Miletichs have been unable to have any repairs made, including to the interior damage.

In March 2004, the Miletichs filed this action against Travelers, their insurance agent (neither of which is a party to this appeal) and McKibban; the complaint alleged in relevant part that the defendants concealed, failed to disclose and falsely misrepresented "material terms concerning Policy coverage and . . . the evaluation and appraisal of [the Miletichs'] wind and water losses and damages . . . .," that such conduct constituted an unfair business practice and that, as a result of McKibban's representations that he was an expert in roofing and that he would promptly and properly evaluate the Miletichs' losses, he owed them a duty to conduct a proper and accurate evaluation, but failed to comply with that duty. McKibban answered the complaint and several months later, moved for judgment on the pleadings as to the three causes of action against him. After oral argument, the superior court granted McKibban's motion with leave to amend.

The Miletichs filed a first amended complaint. The theory underlying their fraud cause of action was changed from one based on alleged misrepresentations as to the nature and scope of damage to their roof to one alleging that Travelers and McKibban

misrepresented or concealed McKibban's lack of skill, lack of a contracting or adjuster's license and bias (based on the fact that Travelers retained him to buttress its predetermination to deny coverage) and that McKibban was hired to act as an adjuster relating to their claim despite his lack of a license required for such work. Although the first amended complaint also added allegations that McKibban's inspection report was "mere conjecture," had no basis in fact and included legal opinions that had no basis in law, the Miletichs also amended their negligence claim to add allegations that McKibban negligently damaged their roof by walking on it, in addition to their existing theory of professional negligence. The amended complaint also alleged that McKibban's conduct (as described above) violated provisions of the Insurance Code, the Civil Code and various regulations.

McKibban demurred to the claims against him in the first amended complaint, arguing that (1) as a matter of law, he did not owe any duty of disclosure to the Miletichs; (2) the Miletichs did not allege any misrepresentation by him on which they could have justifiably relied; (3) as a matter of law, he had not acted as a "concealed adjuster"; (4) the Miletichs failed to allege that he committed any unfair business practices; and (5) he had no duty to the plaintiffs relating to the inspection that would support a negligence cause of action. The Miletichs opposed the demurrer, arguing that their allegations were sufficient to support the challenged causes of action; although their points and authorities made a passing request for leave to amend if the court was inclined to sustain the demurrers, they provided no explanation as to how they would amend the complaint to cure any deficiencies.

The court sustained each of the demurrers without leave to amend. It held that the first amended complaint failed to allege specific misrepresentations on which the Miletichs could have reasonably relied or facts establishing that McKibban had a duty of disclosure. The court noted that the Miletichs had not alleged the existence of any business relationship between them and McKibban and that, to the contrary, their allegations established McKibban was acting at all relevant times as Travelers' agent, thus defeating their claim for unfair business practices. The court held that the negligence cause of action failed because, as a matter of law, McKibban owed no duty to the Miletichs, citing *Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249 (*Sanchez*). Finally, the court denied the Miletichs leave to amend because they had not met their burden to show a reasonable possibility that the identified pleading deficiencies could be cured by amendment. The court thereafter entered judgment in McKibban's favor and awarded him costs of $1,355.65. The Miletichs appeal.

DISCUSSION

1. *Granting of the Motion for Judgment on the Pleadings*

The Miletichs contend that McKibban's motion for judgment on the pleadings was untimely under San Diego Superior Court Local Rule 2.1.9, which states a general court expectation that challenges to a party's pleadings will be heard prior to the initial case management conference (CMC). The Miletichs challenged the motion on this basis in the trial court and thus the court was aware that the motion was made after the CMC, but nonetheless ruled on the motion on the merits. As nothing in the local rule expressly prohibited the bringing of a motion for judgment on the pleadings after the CMC and in

light of well-established case law holding that such a motion may be made at any time prior to, or even at the time of, trial (*Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650), the superior court had the discretion to allow the motion (particularly in light of the Miletichs' filing of an amended complaint) and exercised its discretion to do just that. The Miletichs do not argue that the court abused its discretion in hearing the motion on the merits and thus have not established that doing so constituted error.

2. *Sustaining of the Demurrers*

A. Fraud

To recover for fraud, plaintiffs must plead and prove that (1) the defendant made a misrepresentation (either by false representation or concealment or nondisclosure of material information by one who has a duty of disclosure), with knowledge of its falsity and an intent to deceive; and (2) they justifiably relied on the misrepresentation, concealment or nondisclosure and suffered damage as a result thereof. (*Lovejoy v. AT&T Corp*. (2004) 119 Cal.App.4th 151, 157-158.) Fraud is a disfavored cause of action and, as such, must be pled with specificity as to each of its elements; general or conclusory allegations will not suffice. (*Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1128.) Thus, a fraud cause of action must be based on allegations showing "how, when, where, to whom, and by what means the representations were tendered." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Further, the normal policy of liberally construing pleadings against a demurrer will not be invoked to sustain a fraud cause of action that fails to set forth such specific allegations. (*Ibid*.)

Here, the allegations of the Miletichs' fraud cause of action assert as follows: After Travelers initially denied the Miletichs' claim for wind damage to their roof and they objected to the denial, it hired McKibban, who it indicated was its "general contractor," to inspect the roof on its behalf to determine the scope of such damage. Based on Travelers' statements, the Miletichs "believed and [McKibban] led them to believe, that he was there to inspect prior to beginning repairs, as a qualified roofer" and, as a result, they allowed McKibban to inspect the roof. If they had known that McKibban was not licensed and that he would cause damage, they would not have let him conduct the inspection.

The foregoing allegations do not establish any express representations made by McKibban. The mere assertion that McKibban "led [the Miletichs] to believe" that he was a qualified roofer and/or that repairs would be made is vague and conclusory and does not in any way meet the specificity requirements for pleading a fraud cause of action.

Further, insofar as the Miletichs' fraud claim is based on concealment or nondisclosure, the first amended complaint does not establish a fiduciary relationship or other factual basis for a duty of disclosure owing by McKibban to them. (Civ. Code, § 1710, subd. (3); *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336.) In fact, the Miletichs' allegations that Travelers hired McKibban to act *on its behalf* in determining the scope of the covered loss, and that the Miletichs had already obtained an estimate from their own general contractor as to the extent of their damages from the storm, establish that they did not have any direct relationship with McKibban, much less a relationship that would give rise to a duty of disclosure. (See *Thompson v. Cannon*

(1990) 224 Cal.App.3d 1413, 1418.) The court properly sustained McKibban's demurrer to the Miletichs' fraud cause of action.

B. Unfair Business Practices

Business and Professions Code section 17200 defines unfair competition to include a "wide range of conduct" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143), including unlawful or unfair business practices. A business practice is unfair if it offends an established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 854; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [a practice need not be unlawful to violate the Unfair Practices Act].) A plaintiff asserting a claim for unfair business practices must allege with reasonable particularity the facts supporting the statutory elements of the violation. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

Here, the Miletichs based their unfair business practices cause of action on the same allegations made in support of their fraud cause of action, including an allegation that the defendants had a "pattern and practice [of] improperly adjust[ing] and evaluat[ing] claims," knowing that their agents and adjusters misled insureds into believing that their policies would cover the claims. As in connection with the fraud cause of action, these allegations are general and conclusory and do not set forth specific facts showing that *McKibban* engaged in a business practice that was unfair or unlawful. Further, the Miletichs have not alleged with specificity the nature of the relief they are seeking. The cause of action purports to seek damages for the defendants' past conduct,

however, the only relief available for unfair business practices is equitable relief, i.e., an injunction and restitution and/or disgorgement ancillary thereto. (*People v. Thomas Shelton Powers, M.D., Inc.* (1992) 2 Cal.App.4th 330, 339-341, abrogated on other grounds by *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 127, 136-137.) The superior court correctly sustained McKibban's demurrer to this cause of action.

C. Negligence

The superior court granted the motion for judgment on the pleadings as to the Miletichs' original cause of action for professional negligence based on the allegations that McKibban improperly evaluated and reported that none of the roof damage was caused by wind. In their first amended complaint, the Miletichs retained the professional negligence allegations, but added allegations supporting a separate theory of liability, to wit that McKibban damaged their roof by walking on it during his inspection. The superior court rejected the Miletichs' negligence cause of action on the ground that, as a matter of law, McKibban did not owe the Miletichs a duty of care. For the reasons that follow, we agree with the superior court's conclusion that the Miletichs' allegations are insufficient to support a claim for professional negligence, but find that it erred in sustaining McKibban's demurrer to their general negligence claim.

The issue of whether a duty of care exists presents a question of law and whether a defendant owes a duty of care to someone who is not in privity with him or her is determined based on policy considerations. (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja*).) Such a determination involves a balancing of various factors, including "the extent to which the transaction was intended to affect the plaintiff, the foreseeability

of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, and the policy of preventing future harm." (*Ibid*.; also *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.)

Applying the foregoing factors, an appellate court has held that an independent adjuster engaged by an insurer owes no duty of care to the insured with which the adjuster has no contractual relationship. (*Sanchez, supra,* 72 Cal.App.4th 249.) In *Sanchez*, the insured submitted a claim to its insurer for damage to a commercial dryer it was transporting for a customer and, although the insured had informed the insurer that immediate repairs were necessary to avoid business losses to the customer, the insurer's adjuster did not act promptly to investigate and adjust the loss. The insured thereafter sued the insurer and the claims adjuster for negligence. (*Id*. at p. 251.)

In holding that the claims adjuster owed no duty of care to the insured, the *Sanchez* court reasoned that it was the insurer rather than the adjuster who was in contractual privity with the insured, had the power to grant or deny benefits under the policy and had the ability to limit its exposure by contract. (*Sanchez, supra*, 72 Cal.App.4th at p. 253.) Based on these considerations, the court concluded that recognizing a duty by the adjuster would potentially subject him to greater liability than that faced by the insurer even though his role was entirely secondary to that of the insurer. (*Ibid*.) Further, it noted that imposing such a duty would subject the adjuster to conflicting obligations, pursuant to which he would be required to argue in favor of both the insurer and the insured in situations where they disagreed as to coverage or the

amount of loss. The court held that such a result would be "poor policy" and would have only nominal benefit to the insured, who could seek recovery directly from the insurer for damages arising from an unreasonable investigation or claim handling. (*Id*. at pp. 253-254.) Accordingly, the court concluded that the adjuster's only duty was to the insurer who engaged him. (*Ibid*.; see also *Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 314 [doctor hired by worker's compensation insurer to evaluate plaintiff's disability held to owe the plaintiff no duty of care relating to his evaluation of the plaintiff's condition].)

The Miletichs attempt to distinguish *Sanchez* on the grounds that McKibban was not an adjuster. However, they do not explain why the considerations relied on in *Sanchez* as a basis for its conclusion that no duty existed (i.e., the adjuster's status as an agent of the insurer, the insurer's control over the investigation and the determination of the extent to which the insureds' claim would be paid and the fact that the adjuster's contractual relationship, and thus its loyalty, is with the insurer rather than the insured) are not equally applicable to someone other than an adjuster who is hired by the insurer to perform services relating to the processing of an insured's claim. The policy considerations cited in *Sanchez* support the conclusion that McKibban did not owe the Miletichs a duty of care relating to the investigation of their damage and his findings resulting therefrom and thus the superior court correctly sustained the demurrer as to their negligence cause of action to the extent that it was based on allegations of professional negligence.

As noted above, however, the Miletichs are also pursuing a general negligence claim against McKibban for damage he is alleged to have caused to their roof in the

course of conducting his investigation. McKibban contends that the analysis of *Sanchez* is equally applicable to this theory of liability and requires a finding that he had no duty. However, it is well established in the law that an agent is liable to third persons for torts committed in the course and scope of his agency (Civ. Code, § 2343; see *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 68-69, & authorities cited therein; also *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 65), a principle that *Sanchez* did not purport to alter. Furthermore the policy considerations on which the *Sanchez* court relied to find that no professional duty existed (i.e., that recognition of a professional duty by the adjuster to the insured might create greater liability on the adjuster's part than that faced by the insurer and would subject the adjuster to conflicting obligations) are not implicated by recognizing a general duty of due care. For these reasons, we conclude that the Miletichs' allegations are sufficient to support a cause of action against McKibban for general negligence and that the court erred in sustaining his demurrer as to that claim.

3. *Denial of Leave to Amend*

Finally, the Miletichs contend that the superior court erred in sustaining McKibban's demurrers without giving them another opportunity to amend. However, plaintiffs bear the burden of demonstrating that there is a reasonable possibility that the defects in their pleading can be cured by amendment (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742) and yet the Miletichs have not, either below or in their appellate briefs, offered any explanation as to how they would amend their pleadings to cure the defects identified by McKibban and the superior court. Under these circumstances, we cannot conclude

that the superior court abused its discretion in not granting leave to amend. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349-350.)

DISPOSITION

The judgment is reversed as to the Miletichs' claim for general negligence and is otherwise affirmed. McKibban is awarded his costs of appeal.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P.J.

McDONALD, J.